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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1967

No. 884

EDDIE W. PATTON,

Respondent

v.

STATE OF NORTH CAROLINA,

Petitioner

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	Page
Citation of Opinion Below	1
Jurisdiction	1
Question Presented	2
Statement of the Case	2
Argument	5
Conclusion	11

TABLE OF CASES CITED

	Page
DOUGHTY v. MAXWELL, 376 U. S. 202 (1964)	6
FAY v. NOIA, 372 U. S. 391 (1963)	6
GAINEY v. TURNER, 266 F. Supp. 95 (E.D.N.C. 1967)	10
GIDEON v. WAINWRIGHT, 372 U. S. 335 (1963)	2, 6
GRAY v. HOCKER, 268 F. Supp. 1004 (D. Nev. 1967)	10
GREEN v. UNITED STATES, 355 U. S. 184 (1947)	6
HETENYI v. WILKINS, 348 F.2d 844 (2d Cir. 1965), cert. denied sub nom. MANCUSI v. HETENYI, 383 U. S. 913 (1966)	7
HOBBS v. STATE, 231 Md. 533 (1963), 191 Atl.2d 238, cert. denied, 375 U. S. 914 (1964)	9
HOLLAND v. BOLES, 269 F. Supp. 221 (N.D.W.Va. 1967)	10
JOHNSON v. ZERBST, 304 U. S. 458 (1938)	6
MARANO v. UNITED STATES, 374 F.2d 583 (1st Cir. 1967)	7, 9
MOON v. STATE, 232 A.2d 277 (1967)	8, 9
MOORE v. BUCHKO, (Mich. S.Ct., decided June 3, 1967, Opinion filed Dec. 4, 1967)	10
MURPHY v. MASSACHUSETTS, 177 U. S. 155 (1900)	8
NEWMAN v. RODRIQUEZ, 375 F.2d 712 (10th Cir. 1967)	10
PATTON v. NORTH CAROLINA, 256 F. Supp. 225 (W.D.N.C. 1966)	1, 3, 5, 10
PATTON v. NORTH CAROLINA, 381 F.2d 636 (4th Cir. 1967)	1, 4, 5, 7, 8, 9, 10, 11
PATTON v. ROSS, 267 F. Supp. 387 (E.D.N.C. 1967)	10

Page

PEOPLE v. HENDERSON, 60 Cal.2d 482, 386 P.2d 677 (1963) 7, 10

PICKELSIMER v. WAINWRIGHT, 375 U. S. 2 (1963) 2, 6

RICE v. SIMPSON, 274 F. Supp. 116, 271 F. Supp. 267 (M.D. Ala. 1967) 10

ROBINSON v. UNITED STATES, 144 F.2d 392 (6th Cir.), aff'd 324 U. S. 282 (1944) 8, 10

STARNER v. RUSSELL, 378 F.2d 808 (3rd Cir.), cert. denied, 88 S.Ct. 166 (1967) 10, 11

STATE v. PEARCE, 368 N. C. 707, 151 S.E.2d 571 (1966) 8

STATE v. TURNER, 429 P.2d 565 (Ore., 1967) 10

STATE v. WOLF, 46 N. J. 301, 216 Atl.2d 586 (1966) 10

STROUD v. UNITED STATES, 251 U. S. 15 (1919) 7, 8

UNITED STATES v. ADAMS, 362 F.2d 210 (6th Cir. 1966) 9

UNITED STATES v. LaVALLEE, 330 F.2d 303 (2d Cir. 1964), cert. denied sub nom. LaVALLEE v. DUROCHER, 377 U. S. 998 (1964) 6

UNITED STATES v. WHITE, 382 F.2d 445 (7th Cir. 1967) 10

WALSH v. UNITED STATES, 374 F.2d 421 (9th Cir. 1967) 7, 9

WHALEY v. NORTH CAROLINA, 379 F.2d 221 (4th Cir. 1967) 9

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OPINIONS BELOW

The opinion of the District Court (App. B of Petition) is reported at 256 F. Supp. 225 (1966). The opinion of the Court of Appeals for the Fourth Circuit (App. C of Petition) is reported at 381 F.2d 636 (1967).

JURISDICTION

Jurisdictional requirements arising under 28 U.S.C. § 1254 (1) are adequately set forth in the Petition.

QUESTION PRESENTED

Was the Court of Appeals correct in holding that a state denies due process of law and equal protection when it more harshly sentences a defendant following retrial for the same offense from which the accused successfully appealed when:

a) no defendants other than the class consisting solely of "successful" appellants are subjected to the risk of harsher sentencing;

b) the second trial did not result from any trial or sentencing error prejudicial to the state in the first trial, but solely because the defendant was denied his constitutional right of counsel;

c) the state at no time following imposition of the original sentence questioned its adequacy or sought to have it set aside or revised as being unduly lenient;

d) nothing in the record of the second trial yields facts which would provide a rational basis for a harsher sentence; and

e) the record of the second trial in fact establishes that the defendant had an even lesser role than was established in the first trial when he was denied his right to counsel.

STATEMENT OF THE CASE

In October, 1960, Eddie Patton, Roy Robinson, and Sam Clark were convicted in the Superior Court of Bladen County, North Carolina, of armed robbery of $5 cash and a $20 shotgun from a country store. Clark and Robinson, represented by counsel, were sentenced to ten years imprisonment. Patton, an indigent of meager education without benefit of counsel, was sentenced to twenty years imprisonment.

After serving nearly five years (at the conclusion of which he would have been eligible for parole), Eddie successfully applied for review of his conviction under *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963). He remained in custody, and on February 17, 1965, after tendering a plea of not guilty, he was again convicted by jury on the original indictment. At this second trial, where Eddie was represented by counsel, the State's evidence of his role in the alleged robbery was less

damaging than the evidence presented in the first trial: (See second trial record and compare State's Appeal Brief, pp. 3-4)

> a) No evidence was offered to indicate that Eddie was the ringleader or instigator of the robbery. To the contrary, the evidence was that Eddie was intoxicated, that Robinson rather than Patton held a gun on the store owner from whom $5 was taken, that Robinson and Clark (both represented by counsel in the first trial) drove the car, that Patton never drove the car, and that Patton was "passed out" on the back seat for much of the three day period. The record of the second trail fails to indicate who first suggested the robbery or who, if anyone, especially pressed the idea.
>
> b) No evidence whatever was offered to the effect that the victim was assulted or injured.

As subsequently found by the federal district court as a matter of fact, moreover, "there is not one scintilla of evidence in the record [of the second trial] to rationally support the impostion of a harsher penalty." *Patton v. State of North Carolina*, 256 F. Supp. 225, 236 (W.D.N.C. 1966), a fact that the State did not dispute at the time, on appeal or even now.

Before sentence was imposed at the close of the second trial, Eddie's court-appointed counsel specifically called the court's attention to the fact that Eddie had been continuously imprisoned for this offense from June 10, 1960, and that he had already served nearly five years. Eddie also asked that the court consider that he had already served nearly five years, that he was getting old, and that a severe sentence would leave him without

> any hopes of getting out. And a person without [hope] is—Well, I don't know whether you would—I know that you couldn't understand how it would be without hope.

Whereupon the following extraordinary exchange occurred between Patton and the trial judge (Tr., pp. 5-7):

> THE COURT: No, sir. I am not without hope, because I am a Christian. Are you?
>
> DEFENDANT: I believe there is a God. I am not a Christian. . . .

THE COURT: . . . .Then I can see maybe why you are without hope . . . . Mr. Patton, no one can have any hope who is without Christ.

DEFENDANT: If your Honor would let me explain . . . .

THE COURT: . . . . Yes, sir, I will.

DEFENDANT: I don't believe in penitentiary and jail as a Christian. I do believe there is a God, and I believe that either side—there was a thief on either side—and both of them knew they were in the presence of God. The first one stated to him, "You being the Christ, call your angels and get us down. You said he would give you charge over them." And the other one said, "Antagonize this man not. You and myself are justified in being here, and he is unjustly accused." He said, "This day you will dwell with me in Paradise." Well, they both (some unintelligible) One was interested in soul salvation; the other one was only interested in getting down. That is why I say I don't believe in jail house or penitentiary religion. If I had anything to say to God, I would throw up my head and do it humbly, and not for show. Is there anything else you would like to ask me?

THE COURT: No. You are the one that is telling me anything you want to. I am the one who is going to do this sentencing. Anything you want to tell me, you tell me. You have told me you didn't have any hope. I told you that every man without Christ has no hope, but I do have hope because I am a Christian.

Moments later, sentence was imposed effectively extending Eddie's imprisonment by five years and utterly destroying the parole eligibility that he would have had simply by foregoing his postconviction remedy and remaining in prison under his original, albeit unconstitutional, conviction. As Judge Sobeloff correctly summarized the situation (381 F.2d 636, 637):

Although the trial judge paid lip service to the idea of crediting Patton with that portion of the initial twenty-year sentence already served, he actually increased Patton's punishment by imposing, in effect, a twenty-*five* year sentence and then deducting five years for the time served. Thus, as a result of seeking and obtaining a new trial, the prisoner, who originally would have

been eligible for parole in October 1965, now, it is agreed, will not become eligible until February 1970.

Patton applied in August 1965 to the federal district court for a writ of *habeas corpus*, contending that a harsher sentence following a second conviction for the same offense, after the initial conviction has been vacated on constitutional grounds, is a denial of due process of law; is inconsistent with the prohibition against double jeopardy; and is a denial of equal protection of the law. The district court held that increased punishment violated the due process and equal protection clauses of the fourteenth amendment, at least when no person convicted of an offense except a successful appellant is made subject to an upward revision of his sentence and at least when there is nothing "contained in the record [of the second trial] tending to rationally support the imposition of such a penalty. . . ." 256 F. Supp. at 236. On appeal by the State, the court of appeals for the fourth circuit (*per* Sobeloff, Bell, and Winter) affirmed on three separate grounds: forcing the waiver of one's original sentence as a condition of appeal unreasonably inhibits a due process right to a fundamentally fair trial; permitting the upward revision of sentences solely of a class availing themselves of post conviction remedies is arbitrary and offensive to the equal protection clause; imposing further punishment for the same offense offends standards of double jeopardy protection inherent in due process of law. See *Patton v. State of North Carolina*, 381 F.2d 636 (4th Cir. 1967).

The State's petition for rehearing *en banc* was denied, and the State thereafter sought *certiorari* from this Court.

ARGUMENT

1. *The Decision Below is Clearly Correct.* While never conclusive of this Court's discretion, and while inappropriate for development at length in this brief, the essential soundness of the Opinion and decision below provide good reason for this Court not to postpone the effective date of the lower court's order through the exercise of its *certiorari* power. On the facts of this case, it is respectfully submitted that the district court's issuance of a writ of *habeas corpus* was indubitably correct. Bearing in mind that respondent

has been held in prison more than a year beyond the time he achieved parole eligibility under his original sentence and that he cannot receive parole consideration under the district court's order until after this Court finally disposes of the petition for *certiorari*, it would create unreasonable hardship for respondent to be further deprived of his liberty if it is clear from the outset that the writ of *habeas corpus* was properly issued.

Even assuming that this Court may soon find it appropriate for other reasons to review the constitutionality of harsher sentencing generally, therefore, we respectfully urge that this is not the occasion to do so because: (a) issuance of the writ below was clearly correct on the facts of this case; (b) further delay in the issuance of the writ would serve no useful purpose and would work a further hardship to respondent almost as great as though the harsher second sentence were itself given full effect; (c) other cases presenting the general issue but where the decision below is not so clearly correct and where *certiorari* would not operate as an unnecessary hardship will provide this Court with ample opportunity to resolve any conflicts which may arise.

2. *No Conflict Exists With Any Decision of This Court.*

This Court has not, in recent years, specifically reviewed the permissibility of more harshly sentencing successful criminal appellants following retrial for the same offense. A review of Judge Sobeloff's opinion, however, will confirm the statement that the court of appeals faithfully applied appropriate standards of due process, equal protection, and double jeopardy as reflected in contemporary cases decided by this Court. Thus, *Gideon v. Wainwright*, 372 U.S. 335 (1963) clearly establishes the right of an indigent to assigned counsel at the trial stage of a felony. *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963), makes it plain that one's right to counsel is not to be washed out merely because his conviction was unconstitutionally obtained prior to the date of *Gideon* itself. See also *Doughty v. Maxwell*, 376 U.S. 202 (1964); *United States v. LaVallee*, 330 F.2d 303 (2d Cir. 1964), *cert. denied sub nom. LaVallee v. Durocher*, 377 U.S. 998 (1964). And cases moving from *Johnson v. Zerbst*, 304 U.S. 458 (1938), *Green v. United States*, 355 U.S. 184 (1947), and *Fay v. Noia*, 372 U.S. 391 (1963), forthrightly forbid

the use of unreasonable conditions or forced and fictitious waivers to clog the right to a fair trial. As Chief Justice Traynor readily recognized in applying these (and other) cases to forbid harsher sentencing in California, in a decision rendered four years prior to the court of appeals decision in this case (*People v. Henderson*, 60 Cal.2d 482, 497, 386 P.2d 677, 686 (1963)):

> Since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal.

Addressing itself to the same line of precedent (plus other cases also appropriately relied upon by Judge Sobeloff), the United States court of appeals for the second circuit arrived at the same result under equivalent circumstances and this Court denied *certiorari* (*Hetenyi v. Wilkins*, 348 F.2d 844 (2d Cir. 1965), *cert. denied sub nom. Mancusi v. Hetenyi*, 383 U.S. 913 (1966)):

> By placing this unconscionable premium upon a successful appeal by an accused, a vital societal interest is threatened—assuring that liberty shall not be deprived without a trial free from legal error prejudicing the accused's substantial rights.

The courts of appeals for the first and ninth circuits understand the decisions of this Court in the same way. *Marano v. United States*, 374 F.2d 583 (1st Cir. 1967); *Walsh v. United States*, 374 F.2d 421 (9th Cir. 1967).

It is true that a few early decisions of this Court had the incidental effect of upholding harsher sentences, but only where the defendant's argument went entirely overboard. In *Stroud v. United States*, 251 U.S. 15 (1919), for instance, petitioner claimed that the double jeopardy clause protected him even from being *retried* for the same offense of which he had once been convicted and from which he had successfully appealed. As Judge Sobeloff noted below (381 F.2d at 644-45):

> *Stroud* thus stands for no more than the well-established proposition that the double jeopardy clause does not entitle a defendant who successfully attacks his conviction to absolute immunity from reprosecution.

A review of other decisions which might otherwise appear to be superficially at odds with this case will disclose that they, too, considered only the overboard argument rejected in *Stroud*. *See, e.g., Robinson v. United States*, 144 F.2d 392 (6th Cir.), *aff'd*, 324 U.S. 282 (1944); *Murphy v. Massachusetts*, 177 U.S. 155 (1900). There is thus no conflict even with this Court's early decisions, but only a conscientious reconciliation which does not warrant further review at the expense of additional hardship to the respondent in this case.

3. *No Conflict Currently Exists with the Supreme Court of North Carolina.*

As set forth in petitioner's brief (p. 5), it is correct that in the past the state supreme court routinely found nothing improper in the use of harsher sentences following retrial of a successful criminal appellant. All but one of these precedents antedate this case, however, none discloses any anticipated response to the reasoning and authority used in this case, and they are therefore utterly inconclusive in suggesting that the state supreme court will not now respect the reasoning and result in this case.

One case, *State v. Pearce*, 368 N.C. 707, 151 S.E. 2d. 571 (1966), was decided by the state supreme court after the decision in this case in the district court but before affirmance by the court of appeals. There is no reason to suppose that whatever may have restrained the state supreme court from adopting a district court opinion on a federal question involving state criminal procedure will carry over in a mechanical fashion against the United States court of appeals which has now ruled in a definitive fashion for the entire fourth circuit. Indeed, denial of *certiorari* by this Court should have virtually the same effect in discouraging such a possible conflict as though this Court were to take review and to affirm. However this may be, there is currently no rejection by the state of the principle of *Patton* as established by the court of appeals for the fourth circuit.

Nor is there any current conflict with the Maryland supreme court as alleged in petitioner's brief. *Moon v. State*, 232 A.2d 277 (1967) is an intermediate state court decision which the Maryland Supreme Court has more recently agreed to review on *certiorari*.

(Md. Ct. of App., Misc. Docket No. 45, Sept. Term, 1967, Writ issued on October 10, 1967). The lower state court decision was based on a state supreme court case antedating *Patton* (*Hobbs v. State*, 231 Md. 533 (1963), 191 Atl.2d 238, *cert. denied*, 375 U.S. 914 (1964)). It seems evident that the state supreme court desires to reconsider its earlier position in light of *Patton*. Thus, it is premature to suppose any conflict with *Patton*, and the fairer guess might well be that the Maryland high court will itself establish a desired uniformity. Its possible failure to do so might then warrant review in this Court of the *Moon* case, but surely does not justify further delay with attendant hardship to respondent in this case.

4. Such Differences As May Exist With Other Lower Federal Courts Do Not Warrant Resolution Through Review of This Case.

The extent to which harsher sentencing of successful criminal appellants is constitutionally permissible has only recently begun to receive serious consideration in the federal courts. (For an explanation and review of the general problem, see Van Alstyne, "In Gideon's Wake: Harsher Penalties and the 'Successful' Criminal Appellant," 74 Yale L. J. 606 (1965)). It is therefore unsurprising that different results would appear where differing facts suggest that certain distinctions should be made in the treatment of particular cases. Yet, while *dicta* in the several cases recently concerned with this problem arrange themselves along a fairly broad spectrum, no case has been found upholding the imposition of harsher sentencing on facts as compelling as in this case. Thus, no clear conflict currently exists respecting the result in this case and this Court is respectfully urged to reserve its discretionary power of review for an occasion where the result below is more doubtful, the hardship to respondent less considerable, and the presence of conflict more genuine.

The first, fourth, sixth, and ninth circuit courts have all resolved the issue against the permissibility of harsher sentencing under circumstances even less compelling than in this case. *Marano v. United States*, 374 F.2d 583 (1st Cir. 1967); *Whaley v. North Carolina*, 379 F.2d 221 (4th Cir. 1967); *United States v. Adams*, 362 F.2d 210 (6th Cir. 1966); *Walsh v. United States*, 374 F.2d 421 (9th Cir. 1967). The district courts, even including some outside those cir-

cuits, have been in accord. See, *e.g.*, *Rice v. Simpson*, 274 F. Supp. 116, 271 F. Supp. 267 (M.D. Ala. 1967, Johnson, Chief Judge); *Gray v. Hocker*, 268 F. Supp. 1004 (D. Nev. 1967); *Holland v. Boles*, 269 F. Supp. 221 (N.D.W.Va. 1967); *Patton v. Ross*, 267 F. Supp. 387 (E.D.N.C. 1967); *Gainey v. Turner*, 266 F. Supp. 95 (E.D.N.C. 1967). The state high courts of California, Oregon, New Jersey, and Michigan, having had recent occasion to review the problem, are also in accord (albeit that the result has been reached partly on nonfederal grounds). *People v. Henderson*, 60 Cal.2d 482, 386 P.2d 677 (1963); *State v. Turner*, 429 P.2d 565 (Ore., 1967); *State v. Wolf*, 46 N.J. 301, 216 Atl.2d 586 (1966); *Moore v. Buchko* (Mich. S.Ct., decided June 3, 1967, Opinion filed Dec. 4, 1967).

Three courts of appeals, for the seventh, tenth, and third circuits, have recently affirmed harsher sentences following retrial. *United States v. White*, 382 F.2d 445 (7th Cir. 1967); *Newman v. Rodriquez*, 375 F.2d 712 (10th Cir. 1967); *Starner v. Russell*, 378 F.2d 808 (3rd Cir.), *cert. denied*, 88 S.Ct. 166 (1967). All three cases are distinguishable from *Patton*, however, and it is extremely doubtful whether any of those courts would disagree with the decision in *Patton* as limited to its facts. In *White*, for instance, the court did not except to *Patton* on its facts but held only that a harsher sentence might be imposed "if circumstances disclosed in a presentence report warrant such a step." 382 F.2d at 449. In *Patton*, however, nothing in the record indicates that the second judge possessed new information unknown to the first judge and the federal district court found as a matter of fact that "there is not one scintilla of evidence in the record to rationally support the imposition of a harsher penalty." 256 F. Supp. at 236.

Newman and *Starner*, like *White*, moreover, were decided prior to the court of appeals opinion in *Patton*. In *Newman*, the court merely followed state court precedent. In *Starner*, the court followed state precedent and incorrectly relied upon *Robinson v. United States*, 324 U.S. 282, in which the petitioner had sought to void the whole second trial. In both cases, moreover, the petitioner had originally pleaded guilty—a factor which the court in *Newman* thought to be significant on the supposition that the judge first imposing sentence did not have the benefit of the state's evidence respecting the gravity of the offense. In *Patton*, however, the

defendant originally pleaded not guilty and altered his plea to *nolo contendere* only after the close of the state's case. As we have previously noted, moreover, the state's case at the second trial where defendant was represented by counsel showed that defendant's role in the alleged offense was *less* prominent and *less* aggravated than was shown in the first trial. And, again, the federal district court held a full hearing on this issue concluding with the finding of fact that the harsher sentence was without rational foundation. Respectfully, therefore, we submit that there is no decision genuinely at odds with *Patton* when a factual comparison has been considerately made. To be sure, *dicta* in *Starner* go further than the holding and the case itself (or another like it) might well be reviewed in this Court in view of its doubtful correctness and its unfortunate *dicta*. That observation, however, scarcely makes it appropriate for this case to serve as the occasion for such a review.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of *certiorari* should be denied. In the alternative, it is respectfully submitted that in the event that a writ is issued, the decision below should be summarily affirmed.

Respectfully submitted,

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